

October 7, 2019

VIA ECF

The Honorable Lorna G. Schofield
U.S. District Court
Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: *Contant, et al. v. Bank of Am. Corp., et al.*,
No. 17 Civ. 3139 (LGS) (S.D.N.Y.)

Dear Judge Schofield:

Pursuant to this Court's November 16, 2018 Order (ECF No. 176), the parties write to update the Court on the status of the above-captioned action.

I. Pleadings

A. Plaintiffs' Motion for Reconsideration and Proposed Amended Complaint

On May 31, 2019, plaintiffs filed a motion for reconsideration of this Court's May 17, 2019 Order granting dismissal as to The Royal Bank of Scotland plc and Société Générale. (See ECF Nos. 276-77.) On June 24, 2019, The Royal Bank of Scotland plc and Société Générale filed their opposition. (ECF No. 285.) On July 8, 2019, this Court denied plaintiffs' motion for reconsideration. (ECF No. 288.)

On July 25, 2019, plaintiffs requested a pre-motion conference with the Court regarding plaintiffs' anticipated motion for leave to file a Third Consolidated Class Action Complaint to include new jurisdictional allegations as to The Royal Bank of Scotland plc ("RBS"). (ECF No. 293.) On July 26, 2019, this Court ordered that by August 2, 2019, plaintiffs submit (1) an unredacted copy of the proposed amended complaint to the Chambers inbox, (2) a blackline version indicating all changes from the last complaint filed, and (3) an application to file the proposed amended complaint in redacted form. (ECF No. 295.) Plaintiffs submitted these materials on August 2, 2019. In the July 26 Order, this Court further ordered that by August 9, 2019, any party opposing plaintiffs' motion for leave to amend file a letter response not to exceed three pages. (*Id.*)

On August 5, 2019, the Court granted plaintiffs' request to file their proposed Third Consolidated Class Action Complaint in redacted form on ECF and ordered plaintiffs to file their proposed Third Consolidated Class Action Complaint in redacted form on ECF and in unredacted form under seal. (ECF 303.) Plaintiffs filed their proposed amended complaint on August 5, 2019. (ECF No. 304.) On August 9, 2019, RBS filed a letter

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response in opposition to plaintiffs' request for a pre-motion conference regarding plaintiffs' proposed amended complaint. (ECF No. 308.) On August 21, 2019, plaintiffs filed their reply letter in further support of their request for a pre-motion conference. (ECF No. 312.)

B. Plaintiffs' Motion for Preliminary Approval of Citigroup and MUFG Settlements

On May 29, 2019, plaintiffs filed a motion for preliminary approval of settlements with Citigroup Inc., Citibank, N.A., Citicorp, Citigroup Global Markets Inc. (collectively, "Citigroup") and MUFG Bank, Ltd. (formerly known as The Bank of Tokyo-Mitsubishi UFJ, Ltd.) ("MUFG"), as well as for certification of the proposed settlement classes for settlement purposes, appointment of settlement class representatives, and appointment of settlement class counsel. (See ECF Nos. 272-74.) On May 30, 2019, this Court ordered that any opposition to plaintiffs' preliminary approval motion be filed by July 11, 2019. (ECF No. 275.) No oppositions were filed. On July 25, 2019, this Court held a preliminary approval hearing, at which this Court requested the parties submit a revised proposed order, incorporating the language proposed by the non-settling defendants in their June 24, 2019 letter (ECF No. 284). On July 26, 2019, plaintiffs submitted the revised proposed order. (ECF No. 296.) On July 29, 2019, this Court entered an Order preliminarily approving the settlements with Citigroup and MUFG, preliminarily certifying the settlement classes, and appointing settlement class representatives and settlement class counsel. (ECF No. 297.)

C. Defendants' Answers to the Second Consolidated Class Action Complaint

On January 11, 2019, Non-Foreign Defendants filed answers to plaintiffs' Second Consolidated Class Action Complaint. (See ECF Nos. 205-216.) The remaining Foreign Defendants not subject to plaintiffs' motion for reconsideration—Standard Chartered Bank, Barclays Bank PLC, BNP Paribas Group, HSBC Bank PLC, and UBS AG—filed their answers on June 3, 2019. (See ECF Nos. 279-283.)

II. Discovery

A. Production of Documents

Pursuant to this Court's November 16, 2018 Order (ECF No. 176), Non-Foreign Defendants produced to plaintiffs documents and recordings produced in discovery in *In re Foreign Exchange Benchmark Rates Antitrust Litigation* (S.D.N.Y. No. 13-cv-7789) ("FOREX"), as well as transactional data for spot FX Instrument transactions with entities identified as retail foreign exchange dealers ("RFEDs") by plaintiffs in November 21, 2018 and December 21, 2018 correspondence. On May 10, 2019, defendants produced FOREX plaintiffs' redacted expert reports filed in connection with FOREX

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plaintiffs' motion for class certification. Discovery was stayed as to Foreign Defendants until the Court's ruling on their joint Rule 12(b)(2) motion to dismiss. After this Court's ruling, on June 20, 2019, UBS AG, HSBC Bank plc, and Standard Chartered Bank similarly produced to plaintiffs documents and recordings produced in discovery in *FOREX*, as well as transactional data for spot FX Instrument transactions with entities identified as RFEDs by plaintiffs in correspondence dated November 21, 2018 and December 21, 2018.

On March 11, 2019, Non-Foreign Defendants served a first set of requests for production on plaintiffs. On May 1, 2019, plaintiffs served their responses and objections. Defendants first requested that the parties meet and confer on May 17, 2019, and the parties are continuing to meet and confer. On June 5, 2019, defendants first proposed search terms to be applied to plaintiffs' electronic document collections. On June 27, 2019, the parties agreed to proposed search terms, subject to revisions based upon the results as applied to plaintiffs' electronic documents. Defendants requested and plaintiffs agreed to substantially complete production of plaintiffs' documents other than electronically stored information ("ESI") in response to defendants' first set of requests by July 31, 2019, and to substantially complete production of plaintiffs' ESI documents in response to these requests by August 30, 2019. On July 31, 2019, plaintiffs substantially completed their production of non-ESI documents in response to Non-Foreign Defendants' first set of requests. On August 29, plaintiffs produced ESI documents in response to Non-Foreign Defendants' first set of requests. Plaintiffs made supplemental productions on August 30, September 6, September 12, September 13, September 20, September 27, and October 1. On October 3, 2019, plaintiffs produced additional cooperation materials that were produced to plaintiffs by a settling defendant on October 1, 2019.

On September 11, 2019, plaintiffs sent a letter to the Goldman Sachs Defendants with certain questions and requests regarding the Goldman Sachs productions of transactional data. The Goldman Sachs Defendants responded on September 30, 2019. Plaintiffs sent similar letters to Bank of America, BNP Paribas, Credit Suisse, Deutsche Bank, Morgan Stanley, and UBS on September 27; and to Barclays, JPMorgan, and RBS on October 6.

On October 7, 2019, plaintiffs served first sets of requests for production on defendants Bank of America, Barclays Bank PLC, Barclays Capital Inc., BNP Paribas, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan, Morgan Stanley, RBC, RBS Securities Inc., Standard Chartered, and UBS.

B. Initial Disclosures

Plaintiffs and Non-Foreign Defendants exchanged initial disclosures on February 11, 2019. On June 17, 2019, HSBC Bank plc served initial disclosures on plaintiffs,

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followed by UBS AG and BNP Paribas (SA), both of whom served their initial disclosures on June 27, 2019. Standard Chartered Bank served initial disclosures on July 3, 2019. Barclays Bank PLC served initial disclosures on July 16, 2019.

C. Interrogatories

On February 11, 2019, defendants BNP Paribas US Wholesale Holdings Corp. and BNP Paribas Securities Corp. served a first interrogatory on plaintiffs, to which plaintiffs served their responses and objections on March 13, 2019. On March 11, 2019, The Goldman Sachs Group, Inc. and Goldman Sachs & Co. LLC also served a first set of interrogatories on plaintiffs, as did Deutsche Bank AG and Deutsche Bank Securities Inc., to which plaintiffs served their responses and objections on May 1, 2019. On June 17, 2019, defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. served a first set of interrogatories on plaintiffs. On July 19, 2019, plaintiffs served their responses and objections to JPMorgan's interrogatories and on July 25, 2019, plaintiffs served their amended responses and objections. On July 26, 2019, plaintiffs served a supplemental amended response to BNP's interrogatory. On September 19, 2019, defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. served a second set of interrogatories on plaintiffs.

On April 2, 2019, plaintiffs served a first interrogatory on all defendants. On May 2, 2019, responses and objections to this interrogatory were served by BNP Paribas US Wholesale Holdings Corp. and BNP Paribas Securities Corp.; Bank of America Corporation, Bank of America, N.A., and Merrill Lynch, Pierce, Fenner & Smith Incorporated; Barclays Bank PLC and Barclays Capital Inc.; Credit Suisse AG and Credit Suisse Securities (USA) LLC; Deutsche Bank AG and Deutsche Bank Securities Inc.; The Goldman Sachs Group, Inc. and Goldman Sachs & Co. LLC; HSBC North America Holdings, Inc., HSBC Bank USA, N.A., and HSBC Securities (USA) Inc.; JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.; Morgan Stanley, Morgan Stanley & Co., LLC, and Morgan Stanley & Co. International plc; RBC Capital Markets, LLC; RBS Securities Inc.; and UBS Securities LLC.

D. Depositions

On September 27, 2019, pursuant to the Stipulation and Order Regarding Deposition Protocol entered by this Court on March 22, 2019 (ECF No. 240), defendants notified all counsel in this action and two related actions pending before this Court—*FOREX and Allianz Global Investors GmbH, et al. v. Bank of America Corporation, et al.* (S.D.N.Y. No. 18-cv-10364)—of their intent to take the depositions of ten named plaintiffs on November 1, 2019: James Contant, Sandra Lavender, Victor Hernandez, Martin-Han Tran, Carlos Gonzalez, Ugnius Matkus, Charles G. Hitchcock III, Jerry Jacobson, Tina Porter, and Paul Vermillion.

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E. Third Party Discovery

On March 14, 2019, plaintiffs initiated service of subpoenas on sixty-one third parties. On April 11, 2019, FXDirectDealer, LLC filed a motion to quash the subpoena served upon them by plaintiffs (ECF No. 251), which this Court denied on April 18, 2019 (ECF No. 254). On June 27, 2019, plaintiffs mailed letters to eight RFEDs that failed to respond to plaintiffs' subpoenas by their specified production deadlines. Plaintiffs are currently negotiating the scope and manner of responsive productions with counsel for FXDirectDealer, LLC and other RFEDs that timely served responses and objections to plaintiffs' subpoenas.

Since April 5, 2019, certain defendants have initiated service of subpoenas on fifty-eight third parties that plaintiffs have previously identified as RFEDs. Many of these did not in fact operate as RFEDs and defendants are presently meeting and conferring with approximately thirty of those third parties that may have actually operated as RFEDs during the relevant period. Seven of those third parties—Advanced Markets LLC; Charles Schwab Futures, Inc.; FXDirectDealer, LLC; Institutional Liquidity Holdings, LLC (n/k/a/ Navitas Investments, LLC); Phillip Capital Inc.; R.J. O'Brien & Associates, LLC; and Tradestation, the succeeding entity to four other entities identified as RFEDs by plaintiffs (TradeStation FOREX, Inc., TradeStation Securities, Inc., Interbank FX, LLC, and IBFX Inc.)—have made productions to defendants.

To facilitate discovery, the parties have agreed to share with each other documents or data produced in response to a subpoena or request of any kind issued in connection with the action, along with any accompanying cover letter or other transmittal communication, within seven days, to the extent such documents or data were not otherwise served on the other parties by the producing party.

On March 13, 2019, the eleven named plaintiffs, in response to an interrogatory, disclosed eleven purported RFEDs with which they transacted. Based on the discovery to date, three of these entities are domiciled and operate exclusively abroad and have not been subpoenaed by either plaintiffs or defendants.¹ Of the remaining eight, two have been dissolved,² one is in bankruptcy following revelation of fraud,³ two have long since ceased

¹ Dukascopy Bank, SA, HF Markets Ltd., and FOREX Capital Markets Ltd. (UK).

² Alpari (US), LLC and CFS Capital Management LLC.

³ Plaintiffs and Defendants negotiated for the production of certain Peregrine Financial Group, Inc. ("PFG") documents by PFG's bankruptcy trustee. PFG expects to make its first production to Plaintiffs and Defendants by Friday, October 11.

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operations and have no transaction data in their possession,⁴ two are operating outside the United States after being banned from U.S. operations by the CFTC,⁵ and one is still operating as a U.S. RFED.⁶

* * * *

Pursuant to this Court's May 2, 2019 Order (ECF No. 259), the fact discovery deadline has been extended to February 3, 2020 and the case management conference originally scheduled for May 16, 2019, has been adjourned to January 9, 2020. In light of that Order, pre-motion letters in support of dispositive and class certification motions are due on December 26, 2019 (no later than two weeks before the January 9, 2020 case management conference, ECF No. 258).

The parties are not seeking the Court's intervention in any discovery disputes at this juncture.

Respectfully submitted,

⁴ Capital Market Services LLC and MB Trading Futures, Inc.

⁵ Forex Capital Markets LLC and FXDirectDealer, LLC. Alpari (US), LLC, Peregrine Financial Group, Inc., FOREX Capital Markets Ltd. (UK) and CFS Capital Management LLC were also penalized by the CFTC and/or NFA for misconduct including fraudulent marketing and misappropriation of customer funds.

⁶ OANDA Corporation.

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